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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HAMPTON COUNTY

Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2019-000220

Alice Hazel, as GAL for Jacob N.,Respondent,

v.

Blitz U.S.A., Inc., Fred's, Inc., Tiger Express Varnville, LLC, and James Nix,Defendants,

Of whom Fred's, Inc., is thePetitioner.

And

Melinda Cook,Respondent,

v.

Blitz U.S.A., Inc., Fred's Inc., Tiger Express Varnville LLC, and James Nix,Defendants.

Of Whom Fred's, Inc. is thePetitioner.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

- I. Whether the Court of Appeals correctly held Respondents' general negligence claim is not a product liability claim?
- II. Whether the Court of Appeals correctly held there is no identity of interest and no indemnification between Blitz and Fred's as to Respondents' general negligence claim for Fred's own conduct?

COUNTER STATEMENT OF THE CASE

This is an appeal from an order denying an injunction related to the bankruptcy of a non-party. Petitioner Fred's, Inc., ("Fred's") seeks to use the bankruptcy of Blitz U.S.A., Inc., ("Blitz") to avoid responsibility for its own liability. The lower court and the Court of Appeals correctly held that Fred's is not entitled to the protections of Blitz's bankruptcy for its own negligent conduct, and the Court should deny the Petition for Writ of Certiorari.

This case arises out of severe and permanent burn injuries suffered by Respondent minor Jacob N. On November 5, 2010, when his father used a Blitz gas can to pour kerosene on a burn pile in the yard, a "flash ignition" occurred in which the flame of the fire entered the gas container through the unguarded pour spout. (R. pp. 14, 23). This caused the gas container to explode, spraying fuel onto Jacob N., a five-year-old who was standing a few feet behind his father. *Id.* at ¶ 7. Jacob N.'s clothes caught on fire, and he suffered severe burn injuries to over 50% of his body, including his legs, left arm, torso, buttocks, face, and neck. *Id.* at ¶ 10.

The gas container that exploded was manufactured by Blitz, and sold by Fred's. *Id.* at ¶ 8. In 2005, Blitz and Fred's entered into a "Vendor's Hold Harmless and Indemnity Agreement" in which Blitz agreed "[t]o protect, defend, hold harmless, and indemnify Buyer from and against any and all claims, actions, liabilities, losses, royalties, damages, costs and expenses . . . arising out of any actual or alleged death of or injury to any person . . . resulting or claimed to result in whole or in part from any actual or alleged defect in said Products." (R. p. 625). Fred's was also

a certificate holder on three Blitz Insurance Policies—a commercial general liability policy, an excess/umbrella policy, and a products liability policy—in effect at the time of Jacob N.’s injuries. (R. p. 235).

In 2011, after the filing of dozens of lawsuits arising out of injuries from its defective gas cans, Blitz and its related entities filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware. (R. pp. 284, 293; *In re Blitz U.S.A., Inc., et al.*, 2014 Bankr. LEXIS 2461, 2014 WL 2582976, Case No. 11-13603 (PJW) (Bankr. Del. Jan. 30, 2014)). Fred’s is not a related entity of Blitz and was not a party to the bankruptcy proceeding.

On December 19, 2013, Blitz filed a *First Amended Joint Plan of Liquidation*, (“the Plan”) to liquidate Blitz and create a single pool of assets from which to pay specific claims asserted against Blitz and *some* of its insurance policies. (R. pp. 337-425). The Plan provided for a Blitz Personal Injury Trust to which Blitz Personal Injury Claims would be channeled for resolution and payment through the Trust. (R. pp. 343). The Trust was to be funded with over one hundred million dollars, paid by Wal-Mart and “Participating Insurers” of Blitz. (R. p. 291). The Participating Insurers included the products liability policy and excess/umbrella liability policy for which Fred’s was a certificate holder. (R. pp. 94, 235). Fred’s did not pay any money to fund the Trust and no policy covering Fred’s own negligence paid money to fund the Trust.

On November 5, 2013, Respondents Alice Hazel and Melinda Cook (“Respondents”) filed separate actions arising out of Jacob N.’s injuries. (R. pp. 13, 22). The Complaints included causes of action against (1) Blitz for product liability negligence, strict liability, and breach of warranty, (2) Fred’s for general negligence,¹ strict liability, and breach of warranty, (3) Tiger Express

¹ The negligence action against Blitz is labeled “(Negligence – Product Defect)” and the negligence action against Fred’s is labeled “(Negligence)”. (R. pp. 14-15).

Varnville for general negligence, strict liability, and breach of warranty, and (4) James Nix for general negligence. (R. pp. 13-31).

On January 30, 2014, the United States Bankruptcy Court for the District of Delaware issued its *Findings of Facts, Conclusions of Law and Order Confirming Debtors' and Official Committee of Unsecured Creditors' First Amended Joint Plan of Liquidation* ("Bankruptcy Order"). (R. pp. 284-336; *In re Blitz*, 2014 Bankr. LEXIS 2461, 2014 WL 2582976 (Bankr. D. Del. Jan. 30, 2014)). The Bankruptcy Order funds the Trust with over \$163,000,000.00, paid by Wal-Mart and "Participating Insurers." (R. p. 291). The Participating Insurers' money was paid "through the buy-back of the Participating Insurer Policies." *Id.* ¶ H.(1)(a). The Participating Insurers paid the money "on behalf of themselves and all entities **covered under the Participating Insurer Policies.**" *Id.* (emphasis added). Relevant to this appeal, the Bankruptcy Order releases certain claims from liability and channels certain claims to the Blitz Personal Injury Trust. (R. pp. 312-16). Fred's claims absolution of liability based on its status as a certificate holder on a participating Blitz product liability policy. However, Respondents' general negligence claim against Fred's is not "covered under the Participating Insurer Policies." (R. p. 291).

As to the release of claims, the Bankruptcy Order states: "Except as provided in the Plan,² the transfer to . . . the Blitz Personal Injury Trust of the Blitz Personal Injury Trust Assets . . . shall . . . release all obligations of and bar recovery or any action against the Protected Parties . . . for or in respect of all Blitz Personal Injury Claims." (R. pp. 315-16). It is necessary to define the capitalized phrases to understand and interpret the Bankruptcy Order. A "Blitz Personal Injury Claim" is:

² This qualifying phrase means that there are some situations in which the release does not apply. As discussed below, this case presents one of those situations.

All Claims for damages or other relief for, based upon, arising out of, relating to or in any way involving bodily injury and/or property damage that occurred on or before 12:01 AM CST on July 31, 2012, and shall include asserted claims, whether known or unknown, based upon, arising out of, or in any way involving the products, premises or operations of the Debtors and, without any limitation of the foregoing shall include any such claims against Wal-Mart . . . and any direct action claims *by a claimant against the Participating Insurers*.

(R. p. 436) (emphasis added). A “Protected Party” includes, in relevant part, “the Debtors; . . . the Participating Insurers; [and] . . . Vendors.” (R. p. 450). A “Participating Insurer” includes numerous specific insurers of Blitz that paid money to fund the Trust. (R. p. 448). A “Vendor” is “[a]ny entity that, prior to the Effective Date, sold or distributed any product manufactured, sold, distributed or otherwise produced by the Debtors.” (R. p. 453).

The limited extent to which a Vendor is included as a Protected Party is plainly stated in the Bankruptcy Order.

A Vendor . . . sued on a Blitz Personal Injury Claim *might be entitled to coverage under the Participating Insurer Policies*. *If* any of the [Vendors] are *insureds* under the respective policies, they could tender the Blitz Personal Injury Claims to the Participating Insurers for defense and indemnity. Accordingly, any settlement relating to . . . the Participating Insurer Policies must also resolve all claims against Vendors . . . *to the same extent such claims are being resolved against the Debtors, which justifies the inclusion of the Vendors . . . as Protected Parties* under the Plan.

(R. p. 295) (emphasis added). Vendors are included as a Protected Party only “to the extent” a Blitz Personal Injury Claim is covered under a Participating Insurer Policy and is resolved against Blitz as a Debtor.

As to the channeling injunction, the Bankruptcy Order states:

[A]ll Entities that have held or asserted, or that hold or assert any Blitz Personal Injury Trust Claim against the Protected Parties, or any of them, shall be permanently stayed, restrained and enjoined from taking any action for the purpose of directly or indirectly collecting, recovering, or receiving payments, satisfaction, or recovery from any such Protected Party with respect to any such Blitz Personal Injury Trust Claim.

(R. p. 313). There are numerous exceptions to the channeling injunction, including one applicable in this case. (R. pp. 314-15). The “Channeling Injunction shall not enjoin: . . . (6) the rights of any Entity to assert any claim, debt, obligation or liability for payment against a Non-Participating Insurer.” *Id.* A “Non-Participating Insurer” includes “any other Blitz Insurer who is not a Participating Insurer”, i.e., who did not make a payment into the Trust. (R. p. 447).

Jacob N. filed a claim with the Blitz Personal Injury Trust and received \$2,872,315.00 for his product liability claims against Blitz. (R. p. 532). This amount does not even cover his medical bills, which exceed \$3.3 million, and, therefore, does not compensate him for future medical care, pain and suffering, or permanent disfigurement.

In August 2014, Fred’s filed Motions to Permanently Enjoin or Alternatively to Stay Proceedings. (R. pp. 56-59, 266-69). It argued it is released from liability because it is a “Vendor” of Blitz products and Respondents’ claims against Fred’s are subject to the channeling injunction because it “was an additional insured under two participating insurers.” (R. pp. 57-58, 267-68). The Participating Insurers Fred’s refers to are the Old Republic Insurance Company product liability policy (Policy No. MWZY 58888) and the First Specialty Insurance Corporation excess/umbrella liability policy (Policy No. IRE98445). (R. pp. 30, 235).

At the October 27, 2014 hearing on Fred’s motions, Respondents moved to amend the Complaints to remove all claims against Blitz, and to dismiss the product liability breach of warranty and strict liability claims against Fred’s. (R. p. 2, 4). The remaining claim against Fred’s is the general negligence claim based on Fred’s own negligence for continuing to sell a product it knew to be dangerous. (R. pp. 5, 270-71, 281). The amended complaint alleges “Fred’s was negligent for continuing to sell Blitz gas cans after it learned of the cans’ propensity to explode.”

(App. p. 7). In a November 18, 2014 order, the Honorable Perry M. Buckner granted Respondents' motions to amend the complaints and denied Fred's motion for an injunction. (R. pp. 2-6).

The lower court held Respondents' "remaining claim against Fred's for general negligence is not a products liability cause of action subject to coverage under a Participating Insurer Policy. Therefore, it is not within the scope of the bankruptcy release or injunction and does not involve the property of the bankruptcy debtor—Defendant Blitz U.S.A." (R. p. 6). Interpreting the Bankruptcy Court documents, the lower court held, "the bankruptcy court intended for the injunction and release to apply to a third party vendor such as Fred's only as to claims covered by a Participating Insurer policy", and not to Respondents' general negligence claim. *Id.*

Fred's filed a motion to reconsider arguing the general negligence claim is "a derivative claim from a product's liability action", the bankruptcy documents "contemplated inclusion of [Fred's] in the Channeling Injunction" because it is a "vendor", and the Trust is obligated "to indemnify" Fred's in this action³ based on the 2005 Hold Harmless and Indemnity Agreement. (R. pp. 622-23, 628-29). Fred's did not challenge the trial court's ruling that a general negligence claim is outside the scope of the channeling injunction and release. Rather, it asserted only that Respondents' general negligence claim is really a product liability claim. The lower court denied the motion to reconsider, and Fred's filed a notice of appeal to the Court of Appeals. (R. pp. 7-9).

In the Court of Appeals, Fred's argued (1) the general negligence claim falls within the scope of the release and channeling injunction and (2) the claim triggered indemnification under the Hold Harmless and Indemnity Agreement. (App. pp. 5-6). The Court of Appeals disagreed.

As to the scope of the release and channeling injunction, the Court of Appeals held:

³ Fred's has never sought indemnification from the Personal Injury Trust. It only asserted a cross-claim for contractual indemnification against Blitz, an entity that no longer exists.

The Bankruptcy order is clear, however, that not all personal injury claims are subject to the release and Channeling Injunction; rather, the release and injunction are only applicable to the extent the Trust has assumed liability for a particular claim. . . . Said another way, a Vendor is protected by the release and injunction only to the extent a claim is covered by a Participating Insurer policy or as to which a Vendor could seek indemnity against Blitz.

(App. p. 6). Because the commercial general liability policy for which Fred's is a certificate holder did **not** participate in the bankruptcy, "the release and injunction do not protect Fred's from claims asserted against that policy." (App. p. 7). The Court of Appeals discussed the particular allegations of the negligence claim and held, "the claim is directed at the knowledge and conduct of Fred's in its particular dealings with Respondents, not the defective nature of the can. We do not believe the Bankruptcy order intended for a Vendor to be absolved of its own allegedly negligent conduct, even if it related to a Blitz product." (App. p. 7). "Because Respondents' claim was asserted against, and only seeks to recover from, a Non-Participating Insurer, we agree with the circuit court that Respondents' negligence claim is outside the scope of the release and channeling injunction." *Id.* As a final basis for this finding, the Court of Appeals found that its interpretation of the Bankruptcy order is consistent with bankruptcy law because "Fred's, a non-debtor and non-party to the bankruptcy proceeding, acknowledges that any judgment against it [as to the general negligence claim] would not directly affect Blitz or the Trust." (App. p. 8).

As to the indemnification issue, the Court of Appeals held the Hold Harmless and Indemnity Agreement did not create an "identity of interest" under *A.H. Robins Co. Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), between Blitz and Fred's such that a claim against Fred's is a claim against Blitz. (App. pp. 8-9). The Court agreed with Respondents that this situation does not create an identity of interest because the non-debtor's liability rests on its own alleged breach of duty. *Id.* at p. 9. "Here, Respondents assert a claim against Fred's based on an alleged independent legal duty and which does not require Blitz to be a necessary party." *Id.* Additionally,

the Court of Appeals held that the Hold Harmless and Indemnity Agreement does not express “an intention to indemnify Fred’s for its own wrongdoing”, and cited law stating that an indemnity contract does not indemnify the indemnitee against losses for its own negligence unless that is expressly and unequivocally stated. *Id.* (citing *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)).

Fred’s filed a petition for rehearing, which the Court of Appeals denied. This Court should deny the petition for writ of certiorari because the Court of Appeals correctly decided the issues before it and remanded the case to the circuit court.

ARGUMENT

The issues raised in the petition for writ of certiorari are narrow, and the Court of Appeals correctly decided them. Petitioners raise two issues: (1) whether the general negligence claim is really a product liability claim, and (2) whether the Hold Harmless and Indemnity Agreement creates an identity of interest between Fred’s and Blitz. It is significant that Fred’s does not challenge the following holdings of the Court of Appeals: (1) “not all personal injury claims are subject to the release and Channeling Injunction; rather, the release and injunction are only applicable to the extent the Trust has assumed liability for a particular claim”; (2) “a Vendor is protected by the release and injunction only to the extent a claim is covered by a Participating Insurer policy or as to which a Vendor could seek indemnity against Blitz”; (3) “only claims asserted against a Participating Insurer are subject to the Channeling Injunction and release”; (4) the Bankruptcy Order does not intend “for a Vendor to be absolved of its own allegedly negligent conduct, even if related to a Blitz product”; and (5) “Fred’s, a non-debtor and non-party to the bankruptcy proceeding, acknowledges that any judgment against it would not directly affect Blitz or the Trust.” (App. pp. 6-8); see *Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573,

743 S.E.2d 778, 785 (2013) (“An unappealed ruling is the law of the case and requires affirmance.”).

The Court of Appeals correctly held the general negligence claim is not a product liability claim and the Hold Harmless and Indemnity Agreement does not apply to Fred’s own negligence. The Court should deny the petition.

I. THE COURT OF APPEALS CORRECTLY HELD THE GENERAL NEGLIGENCE CLAIM IS NOT A PRODUCT LIABILITY CLAIM

Fred’s continues to wrongly attempt to contort Respondents’ claim to avoid liability for its own negligent conduct. The Court of Appeals correctly held that the general negligence claim is not a product liability claim. Any other ruling would provide Fred’s greater absolution than Blitz received when Fred’s paid no money into the bankruptcy Trust for its own liability.

As an initial matter, Fred’s argues the Court of Appeals’ analysis on this issue is incomplete because it does not articulate an affirmative legal duty and proximate cause. (Pet. pp. 11-15). This argument is not only meritless and irrelevant, it is unpreserved. Fred’s never made any argument to the lower court about a specific legal duty or proximate cause. It argued only that “regardless of the allegation of the amended complaint, it’s still as a result of the debtor’s product, Blitz, USA” and “at its very core, its very base, it’s still a products liability claim. Without an alleged defective product, they don’t have a general claim as to Fred’s.” (R. pp. 652-53, 656). “At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.” *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Fred’s failed to make this argument or obtain a ruling on it in the lower court or the Court of Appeals, and it is unpreserved.

Assuming the arguments are preserved, the Court of Appeals correctly held that the general negligence claim is not a product liability claim. “The character of an action is primarily determined by the allegations contained in the complaint.” *Stoneledge at Lake Keowee Owners’*

Ass'n v. Clear View Constr., LLC, 413 S.C. 615, 620, 776 S.E.2d 426, 429 (Ct. App. 2015) (internal quotation marks omitted). “It is well established that the plaintiff is the master of his complaint.” *Chavis v. Fid. Warranty Servs.*, 415 F. Supp. 2d 620, 627 (D.S.C. 2006) (internal quotation marks omitted); see also *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015) (“The effect of this order is to prevent the [Plaintiffs] from being architects of their own complaint . . .”). Respondents, as the masters of the complaints, plead a general negligence action.

The allegations in this case are that Fred’s had notice that the gas cans were dangerous to consumers but chose to continue to sell the cans and, as a result, Jacob N. was injured. The elements of proof for a general negligence claim are: “(1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant’s breach was the actual and proximate cause of the plaintiff’s injury; and (4) the plaintiff suffered an injury or damages.” *Magnolia North Prop. Owners’ Ass’n v. Heritage Cmtys., Inc.*, 397 S.C. 348, 368, 725 S.E.2d 112, 123 (Ct. App. 2012). That is what Respondents allege in this case. The elements for a product liability negligence action are different. In a product liability negligence action, the plaintiff must prove:

(1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; [(3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant . . . [; and (4)] the **manufacturer** breached its duty to exercise reasonable care to adopt a safe design.

Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 215, 609 S.E.2d 565, 568-69 (Ct. App. 2005) (internal citations omitted) (emphasis added). The focus of a product liability negligence action is on the product itself and the defendant’s conduct that resulted in the dangerous nature of the product. In Respondents’ general negligence claim against Fred’s, the focus is on Fred’s knowledge of the danger of the product and its conscious choice to continue selling the gas cans

to make a profit. (R. pp. 8, 11, 658). Rather than alleging Fred's should have made the product safe, Respondents allege Fred's should not have sold the product. (R. pp. 8-11, 657-58). This is a general negligence action. Simply stated, Respondents could not assert the remaining general negligence claim against Blitz. It is based on Fred's knowledge and conduct.

Fred's argument borders on arguing a Rule 12(b)(6), SCRPC, motion as to the merits of the negligence action. Neither the Court of Appeals nor this Court can answer whether there is a duty of a seller to not sell a product it knows to be dangerous because that was never raised to or ruled upon below and is a ruling on the merits of the case. The issue is whether the claim is one in product liability—not whether a legal duty exists. The Court of Appeals correctly held it is not a product liability case and, accordingly, denied the injunction. Setting aside the fact that Fred's never raised to any court the question of identifying “any affirmative legal duty owed by” Fred's, it undoubtedly owes its customers a duty to not sell products it knows are dangerous. (Pet. p. 12). “The duty of care is that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care.” *Snow v. Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). It is foreseeable that someone may be injured if they are sold a dangerous product and such injury is avoidable by the exercise of reasonable care of a seller in discontinuing the sale of a product it knows is dangerous. Fred's cannot legitimately argue that a seller in South Carolina can sell products it knows are dangerous and avoid liability.

Fred's takes issue with the Court of Appeals' consideration of information that Fred's itself submitted to the lower court—the certificate of liability insurance listing Fred's as a certificate holder. (Pet. pp. 10-11). Fred's does not contend that the Opinion states anything incorrect about

the insurance policies discussed. Rather, it takes issue only with the Court's conclusion that the general negligence claim is not covered by the product liability policy. (Pet. p. 10). Notably, Fred's argument is not that a general negligence claim is covered by the policy but that the claim in this case is actually a product liability claim. Nothing about the Court of Appeals' opinion is based on the content of an insurance policy. It is based on the holding that Respondents' general negligence claims against Fred's are not product liability claims. Fred's does not (and never did) argue that the product liability policy that is a Participating Insurer provides coverage for a general negligence action based on Fred's own negligence. Fred's does not argue with the premise of the Court of Appeals' holding—a product liability claim is enjoined and a general negligence claim is not enjoined. It argues only that Respondents' general negligence claim is actually a product liability claim, which, as explained above, the Court of Appeals correctly decided in Respondents' favor.

Fred's takes issue with the Court of Appeals discussion of an analogy about a gas can falling off of a shelf. (Pet. pp. 13-14). The Court did not rely on the analogy for its holding that the claim is not a product liability claim. It only used the analogy only to show that even Fred's acknowledges that not every claim in any way related to a Blitz gas can is subject to the injunction. (App. p. 7) ("Fred's acknowledges that not all claims relating to a Blitz product would be subject to the injunction as a products liability claim, such as, for example, if Fred's knowingly stocked its shelves with misshapen Blitz gas cans that then fell on the head of an unassuming customer."). The significant point is that Respondents' "claim is directed at the knowledge and conduct of Fred's in its particular dealings with Respondents, not the defective nature of the can." (App. p. 7). Stated differently, the fact that the negligence of Blitz may have preceded the negligence of Fred's does not absolve Fred's of liability for its own negligence.

The Court of Appeals correctly concluded that the general negligence claim is not a product liability claim.

II. THE COURT OF APPEALS CORRECTLY HELD THERE IS NO IDENTITY OF INTEREST AND NO INDEMNIFICATION BETWEEN BLITZ AND FRED'S FOR RESPONDENTS' GENERAL NEGLIGENCE CLAIM

The Court of Appeals correctly rejected Fred's argument that the Hold Harmless and Indemnity Agreement applies to any claim related to a sale of a Blitz product.

Fred's does not appeal the Court of Appeals' holding that "a contract of indemnity will not operate to indemnify the indemnitee against losses for its own negligence unless the intention is expressed in clear and unequivocal terms." (App. p. 10) (internal quotation marks omitted). It simply argues that the language of the Hold Harmless and Indemnity Agreement is so broad that it encompasses every claim related to a product and, therefore, creates an identity of interest between Fred's and Blitz. (Pet. p. 17). However, this argument would make the presumption against indemnification for one's own negligence superfluous. The Agreement does not say anywhere that Blitz agrees to indemnify Fred's for its own negligence. The law requiring a clear and unequivocal expression of intent to indemnify for one's own negligence existed prior to the 2005 Vendor Agreement. *See Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989) ("[A] contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."). "[C]itizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." *Ahrens v. State*, 392 S.C. 340, 355, 709 S.E.2d 54, 62 (2011) (internal quotation marks omitted). Fred's and Blitz chose not to use any language regarding Fred's own negligence despite the law known to them.

The Court of Appeals correctly held that there is no identity of interest between Fred's and Blitz such that a claim against Fred's is a claim against Blitz in this case. Fred's cites to *A.H.*

Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986), in support of its argument that the Hold Harmless and Indemnity Agreement mandates that “Respondents’ claim should be subjected to the Channeling Injunction and release even in the face of [Fred]’s status as a non-debtor.” (Pet. p. 17). The Court of Appeals correctly rejected this argument.

A.H. Robins involved numerous actions filed in state and federal courts that arose out of an allegedly defective intrauterine contraceptive, which resulted in the manufacturer, A.H. Robins, filing for Chapter 11 bankruptcy. 788 F.2d at 996. Although the bankruptcy filing stayed actions against A.H. Robins, plaintiffs with cases involving other defendants “sought to sever their actions against Robins and to proceed with their claims against” the other defendants. *Id.* A.H. Robins then filed an action seeking to enjoin actions against its co-defendants and a declaratory judgment that its product liability policy was an asset of the estate. *Id.* at 997. The court “held that all actions for damages that might be satisfied from proceeds of the Aetna [product liability] insurance policy were subject to the stay . . . and enjoined further litigation.” *Id.* The issue in *A.H. Robins* was whether the bankruptcy court had “jurisdiction to grant a stay or injunction of suits in other courts against co-defendants of the debtor.” 788 F.2d at 998.

In this case, the jurisdiction of the bankruptcy court to issue an injunction is not challenged. Rather, the issue is the scope of the injunction. Fred’s relies on a passage in *A.H. Robins* stating a court may issue an injunction in the “‘unusual situation’ . . . when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.” *A.H. Robins*, 788 F.2d at 999. It argues that the Hold Harmless and Indemnity Agreement creates an identity of interest and, accordingly, an “unusual situation” in which Blitz is the real party defendant and a judgment against Fred’s will be a judgment against Blitz. Fred’s

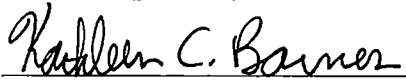
ignores a significant and dispositive part of *A.H. Robins* that the Court of Appeals relied on to reject Fred's argument. In discussing a similar case, the *A.H. Robins* Court stated: "the court first dismissed as inapplicable to the facts of this case the *situation where the third-party defendant was independently liable* as, for example, where the debtor and another are joint tort feasons or *where the nondebtor's liability rests upon his own breach of duty.*" *A.H. Robins*, 788 F.2d at 999 (internal quotation marks omitted) (emphasis added). The Court of Appeals correctly held, "[h]ere, Respondents assert a claim against Fred's based on an alleged independent legal duty and which does not require Blitz to be a necessary party." (App. p. 9).

Consistent with the Court of Appeals' holding, other Courts have permitted claims related to Blitz gas cans to proceed against sellers. *See Gomez v. Scepter Holdings, Inc.*, 2017 U.S. Dist. LEXIS 160567, *8 (M.D. Ga. Sept. 29, 2017) (denying a motion to dismiss where "the allegations are based on [seller]'s own alleged decision to distribute, without an adequate warning, the Blitz gas containers . . . even though [they] both allegedly knew the gas containers were defective"); *Al-Shara v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 47228 (E.D. Mich. Apr. 3, 2012) (holding a plaintiff may continue claims against Wal-Mart, for its alleged independent negligence, even where Blitz had "accepted tender of defense and indemnification" because "where independent claims are asserted . . . it is not at all clear that Blitz's indemnification will indeed be absolute"). The Court of Appeals correctly held that there is no identity of interest between Fred's and Blitz as to Respondents' general negligence claims based on Fred's knowledge and conduct.

CONCLUSION

For the reasons stated, the Court should deny Petitioners' request for a writ of certiorari in this matter.

Respectfully submitted,



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March 28, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HAMPTON COUNTY

Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2019-000220

Alice Hazel, as GAL for Jacob N.,Respondent,

v.

Blitz U.S.A., Inc., Fred's, Inc., Tiger Express Varnville, LLC, and James Nix,Defendants,

Of whom Fred's, Inc., is thePetitioner.

And

Melinda Cook,Respondent,

v.

Blitz U.S.A., Inc., Fred's Inc., Tiger Express Varnville LLC, and James Nix,Defendants.

Of Whom Fred's, Inc. is thePetitioner.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Respondent's Return to Petition for Writ of Certiorari* has been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below on March 28, 2019.

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